

Office-Supreme Court, U.S.  
**FILED**  
**FEB 2 1983**  
ALEXANDER L. STEVAS,  
CLERK

No. 82-908

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**In the Supreme Court of the United States**

OCTOBER TERM, 1982

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**JOAN B. REDHEAD, ET AL., PETITIONERS**

**v.**

**UNITED STATES OF AMERICA**

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**ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE THIRD CIRCUIT**

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**MEMORANDUM FOR THE UNITED STATES IN OPPOSITION**

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Petitioners, the widow and executors of the estate of an individual killed in an airplane crash, contend that the court of appeals erred in affirming the judgment of the district court that an air traffic controller was not negligent in failing to issue a low altitude alert and thus allowing the pilot to attempt a landing.

1. The pertinent facts are stated in the opinion of the court of appeals (Pet. App. 2a-4a). Petitioners' decedent was a passenger in a twin-engine turboprop private plane that crashed into Sugarloaf Mountain near Nemaquin, Pennsylvania, on September 12, 1975, killing the pilot, co-pilot and the two passengers. The plane was en route from Pittsburgh to the Nemaquin airport, which is uncontrolled and does not have an instrument approach procedure approved by the Federal Aviation Administration. The airport is located at an elevation of 2,000 feet above sea

level; surrounding mountains reach 2,900 feet. The weather on the date of the crash was generally poor, with low ceilings and limited visibility, but was improving.

After leaving the Pittsburgh airport, the pilot flew under instrument flight rules and was in radar contact with an air controller located in Cleveland, Ohio. Approximately nine minutes after takeoff, the crew requested and received a cruise clearance of 5,000 feet. Three minutes after this cruise clearance had been obtained, the decedent's aircraft descended to approximately 3,400 feet. When the air controller learned of this development from the altitude data block on his radar screen, he radioed the crew and asked "[W]hat are your intentions?" The crew replied, "We just tak'n a look[.] [W]e're getting some ground contact here, and I think we're gonna make it. But, uh, just standby with us, and, uh, we'll give you a call here in a minute" (Pet. App. 4a). The plane gradually descended until it leveled off at about 2,600 feet. Two minutes later the controller lost radar contact with the plane. The next day the plane was located; it had crashed into a hillside at approximately 2,600 feet above sea level.

2. Petitioners sued the United States for damages under the Federal Tort Claims Act, 28 U.S.C. (& Supp. V) 2671 *et seq.*, claiming that the plane crash was caused by negligence of the air traffic controller: *i.e.*, his failure to direct the pilot of the plane to return to a safe altitude rather than attempting to land under marginal weather conditions. After a trial, the district court determined that the air controller had not acted negligently (Pet. App. 24a-37a). The court reasoned that, contrary to petitioners' contention, the air controller did not have a duty to issue a "low altitude alert" during the plane's descent because the controller was entitled to assume that the plane was operating under visual flight rules and could see the terrain, including the mountains in the area, and because the flight path of the plane did not

exhibit any significant or extreme deviations from what would normally be expected (*id.* at 36a).

A divided court of appeals affirmed (Pet. App. 1a-23a). The court of appeals acknowledged (*id.* at 6a) that the United States could be held liable concurrently with the pilot if air traffic controller negligence was a proximate cause of the accident, but it sustained the trial judge's determination that in the circumstances of this case the controller was not negligent.

Petitioners contended that the controller should have determined from the crew of the ill-fated plane or other sources the actual weather conditions in the area where the plane was located just before the crash, and based upon that information, should have directed the pilot to return to an altitude of 5,000 feet and not to attempt a visual landing. The court of appeals determined, however, that this contention was inconsistent with the relevant principles respecting the duties of controllers as applied to the facts reflected in the record. The court noted that because of the variability of local weather conditions within a general area, the prevalence of relatively poor weather in the vicinity of an airplane does not necessarily preclude a safe landing under visual flight rules (Pet. App. 7a). The court also observed that the controller's only source of detailed weather information on the actual location of the attempted landing was the transmissions of the crew of the decedent's plane (*ibid.*). Based upon the expert testimony of a government witness (credited by the district court in preference to the contrary testimony of petitioners' witness), the court of appeals agreed with the trial court that under the prevailing weather conditions—which were not uniformly bad—the pilot's transmissions permitted the controller to assume that conditions were suitable for landing under visual flight rules (*id.* at 7a-8a). Because “[t]he controller was in no better

position to inform the pilot about the weather than the pilot was himself," and the pilot had "the \* \* \* duty to keep the visual flight minimums necessary for a visual approach landing," the court concluded that the controller had violated no duty and that the cases relied upon by petitioners were distinguishable (*id.* at 9a-10a).<sup>1</sup>

3. Further review is not warranted in this case. The issue presented is entirely fact-bound, for the decision below merely applies settled principles to the particular facts of this case. Indeed, the decision turns largely upon the district court's assessment of the relative credibility of opposed expert witnesses—a matter uniquely entrusted to the trier of fact. As the court of appeals remarked (Pet. App. 8a): "Assessing the testimony of the witnesses in this case depends largely upon their credibility. Although the [petitioners'] expert was helpful to their cause, the controller and the government's experts made out a case of non-liability which persuaded the trial judge."

Contrary to petitioners' contention (Pet. 8-9), the decision below does not conflict with the decisions of other courts of appeals respecting the independent duty of air traffic controllers to safeguard the lives of passengers. Nor does it establish any novel principle of "overriding federal importance" (Pet. 9). The court of appeals explicitly stated, consistent with petitioners' view of the law (Pet. App. 6a; citations omitted):

Both the pilot and the air traffic controller owe a duty of care to passengers in an airplane. Negligence by the pilot does not, in and of itself, absolve the government of liability. Each is responsible for the safe

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<sup>1</sup>Judge Becker dissented (Pet. App. 11a-23a). In his view, the record demonstrated that the controller should have suspected that the pilot was not adhering to the visual flight rules, and accordingly the controller was bound to issue a low altitude alert.

conduct of the aircraft and the safety of its passengers. Thus, there may be concurrent liability.

Stripped to its essentials, petitioners' argument thus rests upon imputation to the court of appeals of views that it squarely rejected (Pet. 8-9).<sup>2</sup> The balance of petitioners' argument (*id.* at 9-14) merely takes issue with the fact-bound concurrent determination of the courts below that the controller was not negligent in this case.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE  
*Solicitor General*

FEBRUARY 1983

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<sup>2</sup>Contrary to petitioners' assumption, the settled propositions that the controller's duty to passengers is independent of the pilot's, and that pilot negligence does not excuse controller negligence cannot possibly mean that information provided to the controller by the pilot must be ignored in determining whether the controller's conduct was negligent.